

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
GEORGE WHITE, on behalf of himself :
and all others similarly situated, :

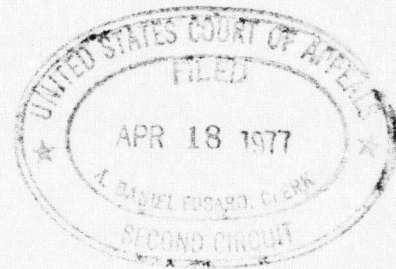
Plaintiff-Appellee, :

-against- :

DAVID MATHEWS, Secretary of the :
Department of Health, Education, :
and Welfare, as an individual :
and in his official capacity, :

Defendant-Appellant. :
-----X

No. 77-6015



BRIEF OF AMICI
IN SUPPORT OF APPELLEES

PHILIP M. GASSEL
TOBY GOLICK
JANE GREENGOLD STEVENS
Legal Services for the Elderly Poor
2095 Broadway, Room 304
New York, New York 10023

JOHN C. GRAY, Jr.
Brooklyn Legal Services, Corp. B
152 Court Street
Brooklyn, New York

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PRELIMINARY STATEMENT

Amici submit this brief in support of appellees. Amici will address only two of the several issues raised in this appeal: the jurisdiction of the Court and the reasonableness of the delays in Social Security disability hearings.

INTEREST OF THE AMICI

Brooklyn Legal Services Corporation B and Legal Services for the Elderly Poor are both federally funded legal services programs. Both offices represent large numbers of claimants for Social Security benefits, and share a general concern for the prompt and efficient scheduling of hearings.

In addition, amici are counsel in a case which raises issues identical to the issues now presented to this Court on this appeal. Amici represent plaintiffs in Martinez v. Richardson (73 CIV 900) now pending before Judge Pratt in the United States District Court for the Eastern District of New York. Plaintiffs in Martinez represent a class of applicants denied Social Security disability in New York State who have requested hearings to appeal the denial of benefits and for whom hearings have not been scheduled within 60 days of request.* Amici are now preparing to make a motion for summary judgment in this case.

*The class was certified by order of the Court (Neaher, J.) dated May 21, 1975.

In preparation for the summary judgment motion in Martinez, amici requested assistance from the Legal Action Support Project of the Bureau of Social Science Research, Inc. in Washington, D.C. Using data from all disability hearings held in New York in the three-year period from 1973 to 1975, the Bureau prepared an elaborate computer study to identify the sources of delay and, if possible, the causes. While this study was based on New York statistics only, amici believe that its conclusions may be of assistance to the Court on this appeal and present these conclusions in Point II of this brief.

POINT I

THE COURT HAS JURISDICTION UNDER
EITHER 28 U.S.C. 1361 OR 42 U.S.C. 405(g)

Appellees are individuals who have requested administrative hearings to appeal decisions to terminate or deny Social Security disability benefits. Appellees, encountering long delays (averaging seven months) in scheduling of hearings, and suffering severe hardship as a result of the denial of benefits, brought this action seeking prompt scheduling of hearings for themselves and the class they represent.

Appellant asserts that the Court has no jurisdiction of this action and that there is no judicial remedy for delay in scheduling hearings. Appellant argues that no matter how many years elapse after a hearing is requested there is no mandamus jurisdiction to require the Secretary to schedule a hearings. Nor is there jurisdiction under 42 U.S.C. 405(g), appellant argues, because this section provides jurisdiction only after a "final decision of the Secretary made after hearings." Thus, appellant's position is, in effect, that whatever the delays in scheduling hearings, judicial inquiry is foreclosed.

Appellant's contention that this Court lacks jurisdiction is incorrect. The Supreme Court has recently restated "the well-established principle that when constitutional questions are in issue," as here, "the availability of judicial review is presumed, and we will not read a statutory

scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing evidence.'" Califano v. Sanders, __U.S.__, 45 U.S.L.W. 4209 (1977). See also Johnson v. Robison, 415 U.S. 361, 366-67 (1974). The Court below was correct in finding appellees' claim to be not immune from judicial review, and in finding jurisdiction under 28 U.S.C. 1361 or alternately under 42 U.S.C. 405(g).

A. Jurisdiction under 28 U.S.C. 1361

The Court below determined that it had jurisdiction over the plaintiffs' claims under 28 U.S.C. 1361 providing original jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Id. The duty owed to the plaintiffs here is both statutory and constitutional in origin. The Secretary has a statutory obligation to provide "reasonable notice and opportunity for a hearing" to appeal adverse disability determinations. 42 U.S.C. 405(h).

Further, the A.P.A. requires that agencies "(w)ith due regard for the convenience and necessities of the parties or their representatives and within a reasonable time...shall proceed to conclude a matter presented to it," 5 U.S.C. 555(b). Appellees have stated a breach of these statutory duties sufficient to grant the Court mandamus jurisdiction.

Further, mandamus jurisdiction is available for those who seek performance of constitutional duties,

Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975); Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974). Many cases now hold that allegations of delay in the delivery of benefits state substantial constitutional claims. See Perez v. Lavine, 378 F.Supp. 1390 (S.D.N.Y. 1974); Nelson v. Sugarman, 361 F.Supp. 1132 (S.D.N.Y.); Andujar v. Weinberger, 67 F.R.D. 690 (1976 S.D.N.Y.). See also Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926) holding that unreasonable delay in adjusting telephone rates may be an unconstitutional deprivation of property.

Mandamus is a traditional remedy to require judges "to do justice according to the powers of their office, whenever the same is delayed" Ex Parte Crane, 30 U.S. 190, 192 (1831) (quoting Blackstone). And the purpose of 28 U.S.C. 1361, as stated in the Senate Report accompanying the bill, was to grant "jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion." 1962 U.S. Cong. & Adm. News 2785 [emphasis added].

For these reasons, this case seems especially appropriate for mandamus jurisdiction and relief which has been held to be applicable to class as well as individual actions, Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973); Frost v. Weinberger, supra.

Appellees argue, however, that mandamus jurisdiction is precluded by the statement in Weinberger v. Salfi, 422 U.S. 749 (1975) that "other sources of jurisdiction" in that case

were foreclosed by 42 U.S.C. 405(h). 42 U.S.C. 405(h) provides:

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer of employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Of course Section 405(h) refers only to "\$41 of Title 28"; Section 1361 was not enacted until 1972 and was not part of that Title. Further, plaintiffs are not seeking to recover on a claim for benefits, within the meaning of 405(h); they are only seeking to insure the availability of administrative hearing procedures. Thus mandamus jurisdiction is not precluded by 405(h) on its face. Moreover, in Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18 (1976), decided after Salfi, the Supreme Court indicates that mandamus jurisdiction over Social Security claims is not precluded by Salfi. The Court notes:

Given our conclusion that jurisdiction in the District Court was proper under §405(g) we find it unnecessary to consider Eldridge's contention that notwithstanding §405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. §1361... 47 L.Ed. 18 at 31, fn. 12.

And, even more clearly, in Norton v. Mathews, 427 U.S. 524,

530 (1976) the Court characterized the question of mandamus jurisdiction in Social Security actions as a "difficult and perhaps close" argument, but obviously not foreclosed by Salfi. See also Califano v. Sanders, supra, in which the Court held that the Administrative Procedure Act is not an independent grant of jurisdiction; the extensive analysis of jurisdictional issues makes clear that the Court does not read 405(h) to bar automatically all other sources of jurisdiction in all Social Security cases.

B. The Court has jurisdiction under 405(g).

Alternatively, the Court has jurisdiction under 42 U.S.C. 405(g). Appellees have ignored this basis for jurisdiction in their appeal brief on the ground that this section was not specifically pleaded in the original complaint. But it is well established that the Court may find jurisdiction based on the facts pleaded in the complaint, even if a specific jurisdictional statute is not pleaded. N.Y.S. Waterways v. Diamond, 467 F.2d 419 (2d Cir. 1972); Friedlander v. Cimins, 520 F.2d 318 (2d Cir. 1975); Weinberger v. Salfi, supra.

42 U.S.C. 405(g) provides the District Court with jurisdiction to review final decisions of the Secretary "made after a hearing." This section was expansively interpreted by the Supreme Court in Mathews v. Eldridge, supra, to provide jurisdiction even in a case where no hearing was held. In Mathews v. Eldridge, the plaintiffs claimed they were entitled to an evidentiary hearing prior to the termination of their

Social Security disability benefits. Regulations of the Secretary provided for a post termination hearing, but plaintiffs had not pursued this administrative remedy. The Court held first that the requirement of a "final" decision by the Secretary was met by the fact that the plaintiff had presented a claim (i.e., that his benefits should not be terminated) to the Secretary which the Secretary had denied. The Court found it insignificant that the Constitutional claim had not been presented to the Secretary, 47 L.Ed. at 30. Next, the Court held that the hearing requirement of §405(g) could be waived, either by the agency or the Courts. The Court held that waiver of the exhaustion requirement by the Court was appropriate "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." Id at 30-31. The Court held that given the nature of the relief requested (a prior hearing), a post-termination hearing could not result in full relief and could not answer the constitutional challenge posed by the plaintiffs.

Appellees' situation is parallel to that of the claimant in Eldridge. They have presented a claim to the Secretary, by requesting benefits, and they have received decisions denying benefits. This is all that Eldridge held was necessary to meet the finality requirement of 405(g).*

*In Eldridge the claimant had not even asked the Secretary for hearings prior to filing his federal suit. The Court held that the request for benefits, even without a request for a hearing, satisfied the finality requirement of 405(g). Here plaintiffs have not only requested benefits, but also requested hearings.

And as in Eldridge, exhaustion in this case would be futile because it is the timing of the hearing which is at issue, not the ultimate outcome of the hearing. For these reasons, 405(g) provides an alternate basis for jurisdiction. See also Mathews v. Diaz, 424 U.S. 67 (1976), decided after Eldridge in which the Court takes the jurisdictional principles of Eldridge a step further and holds there is 405(g) jurisdiction even though the application for benefits was filed after the federal action was commenced, and even in the absence of any formal action by the Secretary denying benefits. Id at 75-77.

POINT II

THE DELAYS IN SCHEDULING SOCIAL SECURITY HEARINGS ARE "UNREASONABLE".

The appellees claim that the Secretary's long delays in scheduling administrative hearings violate the Social Security Act, the Administrative Procedure Act, and deny due process. Since neither of these statutory provisions nor the due process clause state any specific time limit for scheduling hearings, the test under all these provisions is "reasonableness." The Secretary argues that the delays are eminently reasonable because of administrative difficulties caused by the large number of hearing requests and an inadequate number of administrative law judges.

As described in our "Statement of Interest" above, amici have obtained an extensive study of the Social Security appeals process in New York, which is appended to this brief.* The study indicates that the problems of delay in Connecticut described by appellees are shared by applicants for hearings in New York, who wait an average of eight months from the time an application for a hearing is filed until a decision is made [3]. Since the Social Security appeals process is the same in both New York and Connecticut, there is no reason to doubt that the sources of the delay and its causes are also similar. Thus the study may shed light on the issue of the reasonableness of delay.

*References to the study are in brackets in the text.

First, the study documents that most of the delay is caused by non-productive waiting time [3]. For example: a hearing is requested by the applicant by filing a form at a District Office; this form is then transmitted to the hearing office, which then obtains the claimant's file. An average of 11 days elapses between the filing of the hearing request and the receipt by the Hearing Officer; an average of 32 days elapses before all the papers are assembled in the hearing office [3]. All that is involved here is sending of papers; these delays can only be explained by administrative torpidity.

The next step in the process is the assignment of the case to an administrative law judge. There is no technical impediment to doing this as soon as a claimant's file is received, yet the study showed this process consumed an average of 44 days [5].

The study also showed a pattern of unnecessarily long delays once the case was assigned to the administrative law judge. Preparations for hearing begin only at this stage. The judge or his assistants examine the claimant's file and decide if further "development" is needed (generally this means obtaining additional medical evidence). The judge also decides whether to request vocational or medical experts to testify at the hearing.

The study showed the average time between assignment of the case to the Administrative Law Judge and the hearing is more than 111 days, despite the fact that most cases (81 per cent) are not sent out for development [6]. Cases sent

out for development took an average of 31 days longer [6]. But because relatively few cases are sent out for development, delays caused by development are not a significant factor in the overall delay. Development added only 6.5 days to the average processing time [11]. The study, then, confirms the impression of claimants that the Social Security hearing offices are not the beehive of activity suggested by the Secretary. In the absence of time limits or any sense of urgency, papers simply get moved very slowly.

The study also showed that it is untrue that delays are caused by the need to insure fair hearings for unrepresented claimants. There was statistically no difference between represented and unrepresented claimants in the frequency with which development was requested [12]. And development had little impact on the probability of reversal [12]. Similarly, long processing times do not affect outcomes; there is no significant difference in reversal rates between cases taking less than 180 days and cases taking longer [9].

For these reasons amici believe that the delays which occur are neither inevitable nor reasonable. Promises to do better have not resulted in significant improvements in processing times; time limits are needed. The Court below correctly mandated such time limits, to be enforced by requiring provisional benefits to be paid to those whose hearings are delayed beyond the limits fixed by the Court. As the Supreme Court recently reaffirmed in Hills v. Gautreaux, 425U.S.284 (1976) the courts must tailor the scope of the

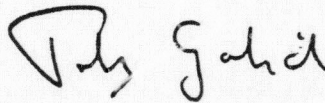
remedy to fit the nature and extent of the constitutional violation; even highly elaborate remedial orders (as in Gautreaux) may be appropriate. The remedy mandated by the Court here is also appropriate and necessary, and should be sustained.

CONCLUSION

For the above reasons, the decision below should be AFFIRMED.

DATED: New York, New York
April 7, 1977

Respectfully submitted,



PHILIP M. GASSEL
TOBY GOLICK
JANE GREENGOLD STEVENS
Legal Services for the Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

JOHN C. GRAY, Jr.
Brooklyn Legal Services, Corp. B
152 Court Street
Brooklyn, New York
(212) 855-8003

DELAYS IN THE SOCIAL SECURITY DISABILITY
CLAIMS HEARINGS PROCESS IN NEW YORK

by

Phillip Weitzman, Ph.D.
Michael Griffing
Andrew Pitts

LEGAL ACTION SUPPORT PROJECT

BUREAU OF SOCIAL SCIENCE RESEARCH, INC.
1990 M Street, N. W.
Washington, D. C. 20036

February 17, 1977

INTRODUCTION AND METHODOLOGY

This report has been prepared by the staff of the Legal Action Support Project of the Bureau of Social Science Research, Inc., Washington, D.C. at the request of Legal Services for the Elderly Poor, New York, New York. It deals with issues concerning delays found in the "hearing" stage of the Social Security disability (Title II) claims process in the State of New York. The purpose of the study is to identify the sources of delay in the process and, to the extent possible, explain their cause.

The data used in this analysis were provided on computer tape by the Bureau of Disability Insurance of the Social Security Administration in Baltimore. The tape included information on disability hearings held in New York over the three year period from 1973 to 1975. Analysis was limited to 6,427 cases which came up for hearing for the first time (as opposed to "remanded" cases, dismissals, etc.) and which actually went through the entire process and not abandoned or otherwise aborted before completion.

The information contained on the computer tape was taken from the Case Record Card (Form HA-503) maintained by the Social Security Administration. The form identifies a variety of procedural and administrative steps in the hearings process and records the date on which each step occurred. These steps are as follows:

- Request for hearing filed.
- Request for hearing received.
- Claims file received by hearing office.
- Case assigned to Administrative Law Judge (ALJ).
- Hearing held.
- Hearing decision mailed to recipient.

The HA-503 form also contains information about:

- Cases transferred to other offices or other judges.
- Case "development" to obtain additional medical or other evidentiary material.
- Postponements of hearings.
- Representation by attorney or other representative.
- Outcome (affirmance or reversal).
- Other miscellaneous facts concerning the case.

Our analysis involved computing the time gaps between the various steps in the administrative process, assessing the overall delays, and identifying where within the process the delays were occurring. We analyzed the impact of factors like development, transfer, postponement, and representation on the length and outcome of the cases. In addition, we divided the data into "New York City" and "other New York State" to see if this shed any light on the source of delays.

SUMMARY OF FINDINGS

1. The hearing process in New York State averages approximately 8 months and delays are largely attributable to nonproductive waiting time.
2. Longer processing times do not affect outcomes.
3. The impact of postponement, transfer, and development on average processing time is negligible.
4. Delays are not the result of ALJ's having to undertake extensive development for unrepresented claimants.
5. Representation has a dramatic effect on the rate of reversals.
6. There is little overall difference in hearing delays between New York City and the rest of the State.
7. Delays in New York State are greater than the national average.

ANALYSIS

1. The hearing process in New York State averages approximately 8 months and delays are largely attributable to nonproductive waiting time.

The data supplied by the Social Security Administration for the three years under study indicate that the average New York State claimant waited 237 days or about 8 months from the time application for a hearing was filed until a decision was rendered. (See Table 1). If we break down the cases into three groups each with approximately one-third of the total, we find that even the fastest one-third took an average of 132 days or about 4 months to complete; the slowest one-third averaged almost one year (351.6 days).

The vast majority of the claims processing time is taken up by essentially unproductive waiting time. To illustrate this point, we examined the entire procedure in order to make rough estimates of the time within which each step of the process can be completed. It should be noted that we formulated a range of estimates which allows a margin of error for unexpected problems. Our resulting estimate is that the period from the date the request is filed until the decision is made should take no more than 60-90 days.

a. Request Filed to Claims File Received
(32 days actual versus 7-14 days estimate)

For the period under study, it took an average of 32 days (14 percent of total processing time) from the time the requests for hearing were filed until receipt of the claimant's files. It appears that little can be done to prepare for a hearing without a claimant's file. At the same time, an average of 11 days (4.5 percent of the total time) elapsed between the time a request for hearing was filed and the time the request was received in the hearing office. We have assumed that some transmission

TABLE 1
MEAN ELAPSED PROCESSING TIME (DAYS)

	Total New York State (n=6120)	Percent of Total Time	All Cases Taking Less Than 180 Days (n=1935)	All Cases Taking Between 180 and 270 Days (n=2176)	All Cases Taking Greater Than 270 Days (n=2009)	Difference Between Slowest and Fastest Group
Total time ^a	236.9	99.9	132.0	224.2	351.6	219.6
Request Filed - Claims File Received . . .	32.3	13.6	23.9	32.0	40.8	16.9
Claims File Received - ALJ Assigned. . . .	43.9	18.5	21.9	43.9	65.5	43.6
ALJ Assigned - Hearing Held.	111.5	47.1	62.6	107.0	164.2	101.6
Hearing Held - Decision Date	49.0	20.7	26.0	41.5	79.1	53.1

^aTotal time does not necessarily equal the sum of the component steps in the appeals process due to the fact that the data cards often contain missing values. For example, the data card might include the date of the request for a hearing and the date the decision was rendered, but omit the date on which the ALJ was assigned. In order to preserve and use as much information as possible, our calculations employ all available data. In the example here, we would include the case in calculations of total time but the case would not be included in calculation of the period ALJ Assigned to Hearing Held.

and processing time is necessary and estimate that a reasonable time for receipt of the hearing request and the claims file by the hearing office is 7-14 days.

b. Claims File Received and Assignment of ALJ
(43.9 days actual versus 0-10 days estimate)

The time during which the claimant's file is received in the hearing office until the assignment of the case to an Administrative Law Judge consumed almost 44 days (18.5 percent of total time). We know of no technical impediment to assigning a case to a judge as soon as the claimant's file is received. In some offices around the country cases are assigned upon the receipt of the file without delay. A master docket system is used in New York.¹ We can discern few, if any, reasons for assignment becoming a source of delay. While we believe that this step should be completed without delay, we have allowed an outside limit of 10 days for unexpected problems.

c. Assignment of ALJ to Hearing Date
(111.5 days actual versus 21-35
days estimate).

It is at this stage of the process that the preparations for hearing occur. The Administrative Law Judge and/or his assistants examine the file, read the various exhibits, prepare the exhibits list, prepare and send the notices for the hearing. In a minority of cases (19 percent) the ALJ decides after examining the file that pre-hearing case "development" is necessary and the case is sent out for

¹"Report of the Disability Claims Process Task Force." Recent Studies Relevant to the Disability Hearings and Appeals Crisis. U.S. House of Representatives, Subcommittee on Social Security of the Committee on Ways and Means (Washington: USGPO, December 20, 1975) p. 98.

development. In some cases, the ALJ also decides to have a vocational or medical expert testify at the hearing. Additional time is also taken up by the advance notice period provided to the claimant.

During the study period, this process alone took more than 111 days (or 47.8 percent of the total time). Taking account of the tasks to be performed, the ALJ's preparation including secretarial work in preparing lists and notices, consumes only a few days of actual work time. To this we would add a period of perhaps 10 days as reasonable advance notice of the hearing. Thus we believe the majority of cases (81 percent during the study period) which are not sent out for additional development could be ready for hearing in 14-21 days.

It would appear that development can take place at the same time that some of the processing discussed above is completed. The 19 percent of cases in which development occurred took, on average, 31 days longer than cases without development, only part of which can be attributed to the period between assignment to the ALJ and the hearing date. (There may also be post-hearing development).² We have no reason to believe that all of this time is inviolable "necessary" time. Including time for development, we believe it reasonable to hold hearings within 21-35 days after cases are assigned to the ALJ. Time taken up by postponement and transfer of cases to other judges or hearing offices is not included in this estimate and should not be to the extent the claimant is responsible for such delays.³

²The impact of case development on the overall mean processing time is minimal. See section 3 below.

³Transfers are not always requested by claimants. See footnote 7, pg. 10.

d. Hearing to Decision Date (49.0 days
actual time versus 30 days estimate)

It took ALJ's an average of 49 days during the study period to render their decisions after hearings. The Report of the Disability Claims Process Task Force indicated that there was no rational justification for the long delays at this final stage of the process. Barring delay attributable to the individual, such as a request for post-hearing development or to introduce additional evidence, the Task Force unequivocally recommend that the Bureau of Hearings and Appeals institute a requirement that decisions be rendered within 30 days of

TABLE 2

	Total NY State Processing Time	Percent of Total Time	Estimated Required Processing Time	Current Unproductive Waiting Time
Total time ^a	236.9	99.9	58 - 89	178.9 - 147.9
Request Filed- Claims File Received	32.3	13.6	7 - 14	25.3 - 18.3
Claims File Received- ALJ Assigned	43.9	18.5	0 - 10	43.9 - 33.9
ALJ Assigned- Hearing Held	111.5	47.1	21 - 35	90.5 - 76.5
Hearing Held- Decision Date	49.0	20.7	30	19.0

^aSee footnote a, Table 1.

hearing.⁴ Accordingly, we adopt 30 days as our estimate of the time reasonably required for this step.

A summary of our estimates along with actual processing times for the cases under study is presented in Table 2. Based on the information above, we estimate that between 62-76 percent of all time spent in the hearings process was essentially unnecessary waiting time. Our estimates, which we believe are generous to the defendants, are that the entire hearings process should take on the average no more than 60-90 days. This is consistent with the announced objectives of the Social Security Administration to reduce the elapsed time to a maximum of 90 days.⁵

2. Longer processing times do not affect outcomes.

In the previous section we saw that disability appeals take approximately 8 months from the date the request is filed until the decision date. There is, however, considerable variation in total processing time. Table 1 presented mean processing times broken down into three groups according to length of total time elapsed. The first group includes all cases with total processing times of less than 180 days. The second group is all cases taking between 180 and 270 days, while the third group is all cases which took in excess of 270 days.

⁴Report of the Disability Claims Process Task Force, supra note 1, p. 99.

⁵"It is our objective to provide every individual with a hearing decision within 90 days of the request for hearing, excluding and barring any delays caused by the individual or by the need for a consultative medical examination, two circumstances which will by their nature require more time." Statement of Hon. James B. Cardwell, Commissioner, Social Security Administration, Department of Health, Education, and Welfare. Delays in Social Security Appeals, Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, September 19, 26; October 3 and 20, 1975 at 39. It should be mentioned that consultative medical examinations are performed by the State Agency. Over the period under study, State Agency development was used in only 7.3 percent of all cases. See footnote 8 below for breakdown of cases by type of development.

Average total time elapsed within each group is 132.0, 224.2, and 351.6 days respectively.

We also see from Table 1 that most of the variation in total time arises in the period between assignment of the ALJ and the decision date. The question arises whether these longer processing times work to the benefit of claimants. Table 3 indicates case outcomes by the three groups of cases outlined above:

TABLE 3

	Affirmations	Reversals
Cases taking less than 180 days	52.7%	47.3%
Cases taking between 180 and 270 days	56.7	43.4
Cases taking greater than 270 days	54.8	45.2
All cases	54.8%	45.2%

As we can see from Table 3, the reversal rate for all cases was 45.2 percent. Furthermore, the reversal rate is not significantly affected by length of processing time. We can reasonably conclude that longer processing times do not affect outcomes.

3. The impact of postponement, transfer and development on average processing time is negligible.

Since transfer, development, and postponement prolong the individual cases in which they occur, they can have a significant affect on the overall average processing times. The extent to which they do affect total elapsed time depends on (1) how long each procedure takes and (2) how often each procedure occurs.

Table 4 shows average processing times for all cases and for those cases which were postponed, transferred, and developed.

TABLE 4

	Mean Total Processing Time (Days)	Percent of All Cases (n = 6,427)
All cases	236.9	100.0%
Postponed cases	281.6	10.1
Transferred cases	275.4	12.1
Developed cases	268.1	19.2

Postponed cases took approximately 45 days longer to process;⁶ transferred cases took 39 days longer; and cases which were developed took 31 days longer. Thus each procedure, when it occurs, significantly prolongs the appeals process.

Table 4 also indicates that these procedures are infrequently used. For the period under study, only 648 or 10 percent of all cases were postponed and 778 or 12 percent of all cases were transferred.⁷ Development occurred in 1,231 or about 19 percent of cases.⁸

⁶Even if postponements are usually requested by claimants, we cannot assume that the entire delay of 45 days is attributable to the claimant. Part of this time is certainly due to delays in rescheduling the hearing.

⁷According to a report by the U.S. Comptroller General intraregional transfers "are the responsibility of the regional chief ALJ" and are made on the basis of the size of the backlogs at hearing offices. Interregional transfers are authorized by SSA "when there is an excessive backlog in a hearing office and (1) other offices within the region cannot render assistance because of their own backlog or (2) assistance could be provided more economically by a hearing office in another region because it is closer." See Problems and Progress in Holding Timelier Hearings for Disability Claimants Report of the Comptroller General of the United States. Washington, D.C.: USGPO, October 1, 1976, at p. 18.

⁸The breakdown of all cases (n = 6,427) by type of development is as follows: District Office - 2.2 percent; State Agency - 7.3 percent; Other - 9.6 percent.

An examination of mean total processing times for cases which were not subject to these procedures yields the following data (Table 5):

TABLE 5

	Mean Total Processing Time (Days)
All cases	236.9
Cases <u>not</u> postponed	232.0
Cases <u>not</u> transferred	231.4
Cases <u>not</u> developed	230.4

We can see that postponement adds only 4.9 days to average processing time; transfer adds only 5.5 days; and development adds only 6.5 days. Thus, while it is true that those procedures prolong the appeals process in the individual cases, their use is so infrequent that they have a negligible impact on average processing time for all cases.

4. Delays are not the result of ALJ's having to undertake extensive development for unrepresented claimants.

Claimants were represented by attorneys in 29 percent of the cases and by nonattorney representatives in 43.1 percent of the cases, while 27.8 percent of the claimants were unrepresented. It might be suggested that extensive, time-consuming development is necessary in order to insure fair hearings for unrepresented claimants.

Table 6 shows the relationship between presence of an attorney and incidence of development.

TABLE 6

	No Development	Development
No attorney present	80.6%	19.3%
Attorney present.	81.3%	18.7%

The percentage of cases developed was about the same for all claimants, regardless of attorney representation - 19.3 percent without an attorney and 18.7 percent with an attorney. It appears, therefore, that there is no relationship between representation or nonrepresentation by counsel and the use of case development. Furthermore, development has little affect on the outcome of cases. Table 7 shows the relationships between development and outcome.

Table 7

	No Development	Development
Affirmed.	54.8%	52.6%
Reversed.	45.2%	47.4%

Thus development only has a slight impact on the probability of reversal.

5. Representation has a dramatic affect on the rate of reversals.

Only 27.8 percent of claimants appeared in the hearings process without some form of representation, but only 18.7 percent of claimants were represented by an attorney alone. The remaining claimants were represented by either a nonattorney alone (43.1 percent of claimants) or by both an attorney and nonattorney working together (10.3 percent).

Table 8 shows the impact of the different kinds of representation on case outcomes.

TABLE 8

	Percent of Cases (n=6427)	Affirmations	Reversals
No representative	27.8%	63.8%	36.2%
Attorney	18.7	49.1	50.7
Non-Attorney	43.1	53.9	46.1
Both	10.3	40.6	59.4
Total	99.9%	54.4%	45.4%

The above data suggest that an unrepresented claimant is substantially more likely to be denied benefits than someone who has an advocate in his or her behalf. Representation by an attorney is slightly more effective than representation by a nonattorney, but representation by both an attorney and a nonattorney is associated with the greatest proportion of reversals--almost 60 percent as opposed to only 36 percent for claimants without any representation.

6. There is little overall difference in hearing delays between New York City and the rest of the State.

During the three year period for which data was provided, approximately 55 percent of the hearings were held in New York City and 45 percent in the remainder of New York State. As indicated in Table 9, there is a relatively small difference between New York City and the rest of the State in the total time elapsed from the time the request is filed until decision date. The mean total time for New York City is less than that

for the remainder of New York State by approximately seven and one-half days. Although the initial administrative steps take more time in New York City, the speed at which the case is decided once the Administrative Law Judge is assigned more than counterbalances the earlier delays. On balance, however, there is little overall difference that can be attributed to location.

TABLE 9
MEAN ELAPSED PROCESSING TIME (DAYS)

	Total New York State (n=6427)	New York City (n=3545)	New York State Outside New York City (n=2882)
Total time	236.9	233.6	241.1
Request Filed - Claims File Received	32.3	35.6	28.1
Claims File Received - ALJ Assigned	43.9	48.7	37.6
ALJ Assigned - Hearing Held	111.5	109.1	114.5
Hearing Held - Decision Date	49.0	40.7	59.8

7. Delays in New York State are greater than the national average.

In order to put the data obtained concerning hearing delays into perspective, it should be instructive to compare processing times of New York State with national averages. In 1974, the Social Security Administration drew a national sample of 427 cases for analysis of processing times. The results of this survey are shown in Table 10, with comparable times from New York State in 1974.

TABLE 10
MEAN ELAPSED PROCESSING TIME (DAYS)

	1974 SSA Sample		1974 New York State	
	Affirmances	Reversals	Affirmances	Reversals
Total time ^a	189.2	208.1	237.4	231.3
Request Filed - Claims File Received	25.4	26.1	30.1	32.3
Claims File Received - ALJ Assigned	35.6	48.0	28.4	26.3
ALJ Assigned - Hearing Held	68.2	79.0	116.8	121.4
Hearing Held - Decision Date	60.0	55.0	62.1	51.3

^aSee Table 1, footnote a. The Social Security Administration does not explain why the total time does not equal the sum of the individual processing stages in its study.

Source: Excerpt from Status Report by Social Security Commissioner Cardwell, Background Material on Social Security Hearings and Appeals, U.S. House of Representatives, Subcommittee on Social Security of the Committee on Ways and Means (Washington: USGPO, September 17, 1975) at 21.

The data indicate that the delays in New York State were substantially greater than the national norms. In the case of affirmances, New York was 48.2 days longer and for reversals 23.1 days longer. Almost all of this difference is attributable to the time period between the date an ALJ was assigned and the date the hearing was held. For this period, the New York mean was 71 percent higher than the national average (116.8 vs. 68.2 days) for cases which were affirmed and almost 54 percent higher (121.4 vs. 79.0 days) for cases which were reversed.